



SEXUAL HARASSMENT IN THE WORKPLACE – A WARNING FOR EMPLOYERS

The High Court of Appeal has upheld the finding of the Cape Division of the High Court that the company is liable for the consequences of the sexual harassment that Gasant Samuels perpetrated against Sonja Grobler, a former employee of Nasionale Tydskrifte (National Magazines). The grounds for the Court of Appeal's finding differ, however, from those of the previous court.

The Cape Court found that the company was indirectly liable for the psychological suffering inflicted on Grobler by Samuels, even though the incident that was eventually responsible for this suffering took place outside of work hours and the job context. The finding was based on an extension of the common-law principle of vicarious responsibility; in terms of which an employer takes responsibility for the unlawful (wrongful) conduct of employees, provided that such conduct takes place in the course and ambit of their service. The decision was met with considerable comment and criticism as a result of this.

On appeal, however, the court took another approach. The judges held unanimously that it was not necessary to base the employer's liability on the vicarious responsibility (indirect accountability) principle and that in truth direct responsibility rested with the employer to stamp out sexual harassment. This obligation arises from the common-law duty that an employer has to ensure a safe work environment and it includes the duty to ensure physical as well as emotional safety. Furthermore it is subject to a test of reasonableness, i.e. did the employer take reasonable steps to prevent harassment? If he did, there is no liability on this ground.

In the case in question it was found that, although the incident that caused Grobler psychological suffering occurred outside of the job context, it could have been averted if management to whom she had disclosed previously that Samuels was harassing her, had taken reasonable steps in the workplace to put a stop to it. The fact that initially Grobler was not prepared to lodge a complaint in terms of the company's sexual harassment policy made no difference, as the manager to whom she complained should have realised that her failure (reluctance) to do so did not mean that she had lied. He should have behaved proactively and informed his seniors accordingly so that Samuels could have been warned to stop the specific action(s). According to the court this would in all probability have had the desired effect and prevented the objectionable final incident.

After this finding employers can be held liable for sexual harassment on at least four grounds, each of which may lead to a substantial claim for compensation.

A proactive course of action is the best remedy for sexual harassment in the workplace. All employees should be made aware that the employer views sexual harassment in a very serious light and that persons who are guilty of harassment open themselves to disciplinary action, which may include dismissal (over and above any civil and criminal consequences).